

**CHAPTER 485**  
**UNIFORM SECURITIES ACT (MODIFIED)**

**SECTION**

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**§485-1 Definitions.** When used in this chapter the following terms, unless the text otherwise indicates, have the following meaning:

- (1) "Commissioner" means the commissioner of securities of the State.
- (2) "Salesperson" means any individual other than a dealer who represents a dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Salesperson" does not include an individual who represents an issuer in (A) effecting transactions in a security exempted by clauses (1), (2), (3), or (10) of section 485-4, (B) effecting transactions exempted by section 485-6, or (C) effecting transactions with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this State. A partner, officer, or director of a dealer or issuer, or a person occupying a similar status or performing similar functions, is a salesperson only if the partner, officer, director, or person otherwise comes within this definition.
- (3) "Dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for the person's own account. "Dealer" does not include:
  - (A) A salesperson;
  - (B) An issuer;
  - (C) A person who has no place of business in this State if:
    - (i) The person effects transactions in this State exclusively with or through the issuers of the securities involved in the transactions; other dealers; or banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or
    - (ii) During any period of twelve consecutive months the person does not direct more than fifteen offers to sell or to buy into this State in any manner to persons other than those specified in clause (i), whether or not the offeror or any of the offerees is then present in this State;
  - (D) Any person licensed as a real estate broker or real estate salesperson under the laws of the State while effecting transactions in a security exempted by section 485-6 (14); or
  - (E) A person who is a resident of Canada, has no office or other physical presence in this State, and:
    - (i) Only effects or attempts to effect transactions in securities with or through the issuers of securities involved in the transactions, broker dealers, banks, savings institutions, trust companies, insurance companies, investment companies (as defined in the Investment Company Act of 1940), pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; with or for a person from Canada who is present temporarily in this State and with whom a bona fide business relationship existed before the person entered this State; or with or for a

- person from Canada who is present in this State; whose transactions are in a self-directed tax advantage retirement plan in Canada of which the person is the holder or contributor;
- (ii) Files a notice in the form of the person's current Canadian securities registration and a consent to service of process;
  - (iii) Is a member of a duly authorized self-regulatory organization or stock exchange in Canada;
  - (iv) Maintains the provincial or territorial registration and membership in a self-regulatory organization or stock exchange of the person in good standing;
  - (v) Discloses to the person's clients in this State that the person is not subject to the full regulatory requirements of this chapter; and
  - (iv) Does not violate this chapter.
- (4) "Fraud", "deceit", and "defraud" are not limited to common-law deceit.
- (5) "Guaranteed" means guaranteed as to payment of principal, interest, or dividends.
- (6) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" does not include:
- (A) A bank, savings institution, or trust company;
  - (B) A lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of the lawyer's, accountant's, engineer's, or teacher's profession;
  - (C) A dealer whose performance of these services is solely incidental to the conduct of the dealer's business as a dealer and who receives no special compensation for them;
  - (D) A publisher of any bona fide newspaper, news magazine, or business or financial publication of general, regular, and paid circulation;
  - (E) A person whose advice, analyses, or reports relate only to securities exempted by section 485-4(1);
  - (F) A person who has no place of business in this State if:
    - (i) The person's only clients in this State are other investment advisers, dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or
    - (ii) During any period of twelve consecutive months the person does not have more than five clients who are residents of this State other than those specified in clause (i);
  - (G) A person who is employed by an investment company that is registered under the Investment Company Act of 1940;

- (H) A person who:
    - (i) Is registered with the United States Securities and Exchange Commission under the Investment Advisers Act of 1940;
    - (ii) Does not have custody of any client money, securities, or other assets;
    - (iii) Does not collect fees from clients more than six months in advance of the end of the period for which the fees are intended to compensate the person for the person's services;
    - (iv) Has discretionary authority over client money, securities, or other assets only to invest in securities in which the person has no ownership interest; and
    - (v) Does not advise a client whose money, securities, and other assets under management by the person have a market value of less than \$250,000 per each separate account under management on the date of the inception of the client relationship;
  - (I) A person who is excluded from the definition of "investment adviser" under section 202(a)(11) of the Investment Advisers Act of 1940;
  - (J) A federal covered adviser; or
  - (K) Other persons not within the intent of this paragraph as the commissioner by rule or order may designate.
- (7) "Investment adviser representative" means:
- (A) With respect to an investment adviser, any individual other than an investment adviser who represents an investment adviser in the business of advising others, either directly or through publications or writings as to the value of securities or as to the advisability of investing in, purchasing, or selling securities; and
  - (B) With respect to a federal covered adviser, any person defined as an "investment adviser representative" who has a "place of business" in this State as those terms are defined in rule 203A-3 of the Securities and Exchange Commission under the Investment Advisers Act of 1940.
- (8) "Issuer" means any person who issues or proposes to issue any security, except that (A) with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued; and (B) with respect to certificates of interest in oil, gas, or mining titles or leases, there is not considered to be any "issuer."
- (9) "Nonissuer" means not directly or indirectly for the benefit of the issuer.
- (10) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.
- (11) (A) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

- (B) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.
  - (C) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value.
  - (D) A purported gift of assessable stock is considered to involve an offer and sale.
  - (E) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.
  - (F) The terms defined in this subsection do not include (i) any bona fide pledge or loan; (ii) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; (iii) any act incident to a class vote by stockholders, pursuant to the articles of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation; or (iv) any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash.
- (12) "Securities Act of 1933", "Securities Exchange Act of 1934", "Public Utility Holding Company Act of 1935", and "Investment Company Act of 1940" mean the federal statutes of those names as amended before or after June 7, 1957.
- (13) "Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, variable annuity contract, voting trust certificate, certificate of deposit for a security, certificate of interest in an oil, gas, or mining title or lease, option on commodity futures contracts or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or fixed annuity contract.
- (14) "State" means any state, territory, or possession of the United States, as well as the District of Columbia and Puerto Rico.
- (15) "Federal covered adviser" means a person who is registered with the Securities and Exchange Commission under section 203 of the Investment Advisers Act of 1940. "Federal covered adviser" does not include:
- (A) A person who is excluded from the definition of "investment adviser" under section 485-1(6)(A) to (I); or

- (B) Other persons not within the intent of this definition as the commissioner by rule or order may designate.
- (16) "Federal covered security" means any security that is a "covered security" under section 18(b) of the Securities Act of 1933 or the rules or regulations promulgated thereunder.

**§485-2 Commissioner of securities.** (a) The administration of this chapter shall be vested in the commissioner of securities. The director of commerce and consumer affairs shall, with the approval of the governor, appoint the commissioner of securities who shall not be subject to chapters 76 and 77. The securities commissioner shall hold the commissioner's office at the pleasure of the director of commerce and consumer affairs and shall be responsible for the performance of the duties imposed under this chapter.

(b) The commissioner of securities may adopt, amend, and repeal, pursuant to chapter 91, such rules as may be necessary to carry out the purposes of this chapter.

(c) Notwithstanding subsection (b), the commissioner of securities may adopt, amend, and repeal forms and orders necessary to implement this chapter without regard to chapter 91. No form or order shall be adopted, amended, or repealed without regard to chapter 91, unless the commissioner of securities finds that the action is in the public interest, necessary or appropriate for the protection of investors, and consistent with the purposes of this chapter.

**§485-3 Assistants; compensation; quarters; reports.** (a) The commissioner of securities shall employ from time to time such other officers, attorneys, clerks, and employees, as are necessary for the administration of this chapter. They shall perform such duties as the commissioner assigns to them and their compensation, and the compensation of the deputies herein provided for, shall be fixed by the commissioner with the approval of the governor, subject to chapters 76 and 77. The commissioner and deputies and each of the employees shall take and subscribe and file the oath of office prescribed by law.

The commissioner, deputies, or any person appointed or employed by the commissioner under this subsection shall be paid, in addition to their salary or compensation when required to travel on official duties, the transportation cost, board, lodging, and other traveling expenses necessary and actually incurred by each of them in the performance of the duties required by this chapter or performed by the direction of the commissioner.

(b) Notwithstanding any other law to the contrary, the commissioner of securities, by contract, may retain the services of attorneys for the enforcement of this chapter. The attorneys shall serve at the pleasure of the commissioner. At the option of the commissioner, attorneys retained by contract under this subsection may be compensated on a fixed-price basis, an hourly rate basis, with or without a fixed cap, or through a contingent fee arrangement to be specified in the contract and payable out of all sums the attorney recovers for the State by judgment, order, or settlement.

(c) The governor shall cause the commissioner to be furnished with such quarters, stationery, furniture, office equipment, and other supplies as may be necessary for the efficient execution of the functions vested in the commissioner by this chapter.

(d) The commissioner shall report to the governor annually upon such date as the governor shall establish. The report shall contain an account of the work of the commissioner during the period covered and such data and information as may be deemed necessary or appropriate.

**§485-4 Exempt securities.** The following securities are exempt from sections 485-4.5, 485-8, and 485-25 (a) (7):

- (1) Any security (including a revenue obligation) issued or guaranteed by the United States, any state or territory, any political subdivision of a state or territory, or any agency or corporate or other instrumentality of one or more of the foregoing, or any certificate of deposit for any of the foregoing;
- (2) Any security issued or guaranteed by Canada, any Canadian province, any political subdivision of the province, any agency or corporate or other instrumentality of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;
- (3) Any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution, or trust company organized and supervised under the laws of any state or territory or any investment certificate issued by a financial services loan company duly licensed under the financial services loan law of the State of Hawaii;
- (4) Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association or any building and loan or similar association organized under the laws of any state or territory and authorized to do business in the State;
- (5) Any security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized under the laws of any state or territory and authorized to do business in the State;
- (6) Any security issued or guaranteed by any federal credit union, or any credit union or similar association organized and supervised under the laws of the State;
- (7) Any security issued or guaranteed by any common carrier, public utility, or holding company which is:
  - (A) Subject to the jurisdiction of the Interstate Commerce Commission;
  - (B) A registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that Act;
  - (C) Regulated in respect of its rates and charges by a governmental authority of the United States or any state or territory; or
  - (D) Regulated in respect of the issuance or guarantee of the security by a governmental authority of the United States or any state or territory;
- (8) Any security other than a security that is a federal covered security pursuant to section 18(b)(1) of the Securities Act of 1933 and therefore not subject to any registration or filings requirements under this chapter, that is listed or approved for listing upon notice of issuance on any exchange registered or exempted under the Securities Exchange Act

of 1934, as amended; any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants so listed or approved; or any warrant or right to purchase or subscribe for any of the foregoing;

- (9) Any security issued by any issuer organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association;
- (10) Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal of the paper which is likewise limited, or any guarantee of the paper or of any renewal;
- (11) Any investment contract issued in connection with an employees' stock purchase, savings, pension, profit-sharing, or similar benefit plan;
- (12) Any option on a commodity futures contract subject to regulation under the Commodity Exchange Act;
- (13) Any cooperative association membership stock, membership certificates or shares, or membership capital, pursuant to section 421C-36, or chapter 421;
- (14) Any security for which a registration statement has been filed under the Securities Act of 1933, provided that no sale shall be made until the registration statement has become effective; and
- (15) Any variable annuity contract which is an investment contract prepared by a life insurance company designed to offer continuous income through participation in a mutual fund portfolio or a variable annuity contract based upon a separate account which is registered as a management investment company with the Securities and Exchange Commission.

**[§485-4.5] Federal covered securities.** (a) The commissioner, by rule or otherwise, may require the filing of any or all of the following documents with respect to a federal covered security under section 18(b)(2) of the Securities Act of 1933:

- (1) Prior to the initial offer of a federal covered security in this State and for purposes of renewal, a copy of the registration statement filed by the issuer with the Securities and Exchange Commission, or in lieu of filing a registration statement, a notice as prescribed by the commissioner;
- (2) A consent to service of process; and
- (3) An initial filing fee of \$200 and an annual renewal fee of \$50 thereafter. The renewal fee shall be collected within two months of the end of the investment or trust company's fiscal year. With respect to an open-end management company, the fees shall be assessed per fund.

(b) The commissioner, by rule or otherwise, may require the issuer of any security that is a federal covered security under section 18(b)(4)(D) of the Securities Act of 1933, to file a notice no later than fifteen days after the first sale in this State of a federal covered security on Securities and Exchange



Commission Form D or comparable form, together with a consent to service of process and a \$200 filing fee.

(c) The commissioner, by rule or otherwise, may require the filing of any document filed with the Securities and Exchange Commission under the Securities Act of 1933, for any security that is a federal covered security under section 18(b)(4) of the Securities Act of 1933.

(d) The commissioner, by rule or otherwise, may waive any or all of the provisions of subsection (a), (b), or (c).

**§485-5 Exempted securities; local development company.** Securities issued by a local development company organized within the State for profit under chapter 414 and approved by the Small Business Administration as qualifying for loans under section 502 of the Small Business Investment Act of 1958, as amended, are exempted from this chapter, except such provisions relating to the prospectus, upon the approval of the commissioner of securities. The commissioner shall grant approval for the exemption upon finding that the proposed plan of business of the applicant and the proposed issuance of securities are fair, just, and equitable, that the applicant intends to transact its business fairly and honestly, and that the securities that the applicant proposes to issue and the method to be used by the applicant in issuing or disposing of such securities are not such as, in the opinion of the commissioner, will work a fraud upon the purchaser thereof.

**§485-6 Exempt transactions.** The following transactions shall be exempt from sections 485-4.5, 485-8, and 485-25 (a) (7):

- (1) Any isolated nonissuer transaction, whether effected through a dealer or not;
- (2) Any nonissuer distribution of an outstanding security if the manual of Hawaiian securities or any other recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years (or during the existence of the issuer and any predecessors if less than three years) in the payment of principal, interest, or dividends on the security;
- (3) Any nonissuer transaction effected by or through a registered dealer pursuant to an unsolicited order or offer to buy;
- (4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;
- (5) Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;
- (6) Any transaction by a personal representative, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

- (7) Any transaction executed by a bona fide pledgee without any purpose of evading this chapter;
- (8) Any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity;
- (9) Any transaction pursuant to an offer to sell securities of an issuer, if the transaction is part of an issue which:
  - (A) There are no more than twenty-five offerees, wherever located (other than those designated in paragraph (8)) during any twelve consecutive months;
  - (B) The issuer reasonably believes that all purchasers, wherever located, (other than those designated in paragraph (8)), are purchasing for investment;
  - (C) No commission, discount, or other remuneration is paid or given, directly or indirectly, to a person, other than a dealer or agent registered under this chapter, for soliciting a prospective purchaser in this State; and
  - (D) The securities of the issuer are not offered or sold by general advertisement or other advertising medium;
- (10) Any offer or sale of a preorganization certificate or subscription for any security to be issued by any person if no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, and the number of subscribers does not exceed twenty-five;
- (11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within ninety days of their issuance, if no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in the State;
- (12) Any offer (but not a sale) of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933, if no stop order or refusal order is in effect and no public proceeding or examination looking toward the order is pending under either this chapter or the Act;
- (13) Any offer or sale by or through a real estate broker or real estate salesperson licensed under the laws of the State, of a security issued on or after July 1, 1961, by a corporation organized under the laws of the State, the holder of which is entitled solely by reason of the holder's ownership thereof, to occupy for dwelling purposes, or to a lease which entitles the holder to occupy for dwelling purposes a house, or an apartment in a building, owned or leased by the corporation, subject, however, to section 485-7;
- (14) Any offer or sale by or through a real estate broker or real estate salesperson licensed under the laws of the State of an apartment in a condominium project, and a rental management contract relating to the apartment, including an interest in a general or limited partnership formed for the purpose of managing the rental of apartments if the rental management contract or the interest in the general or limited partnership is offered at the same time as the apartment is offered. The words "apartment", "condominium", and "project" are defined as they are defined in section 514A-3;

- (15) (A) Any transactions not involving a public offering within the meaning of section 4(2) of the Securities Act of 1933, but not including any transaction specified in the rules and regulations thereunder; or
- (B) Any offer or sale of securities made in compliance with rules 501, 502, 503, 505, and 506 of Regulation D, 17 Code of Federal Regulations section 230.501, under the Securities Act of 1933;
- (16) (A) Any transactions involving the offer or sale of a security by an issuer to an accredited investor that meet the following requirements:
  - (i) The issuer reasonably believes that the sale is to persons who are accredited investors;
  - (ii) The issuer is not in the development stage, without specific business plan or purpose;
  - (iii) The issuer has not indicated that the issuer's business plan is to engage in a merger or acquisition with an unidentified company or companies or other entity or person; and
  - (iv) The issuer reasonably believes that all purchasers are purchasing for investment purposes and not with the view to, or for sales in connection with, a distribution of the security. Any resale of a security sold in reliance on this exemption within twelve months of sale shall be presumed to be made with a view to distribute and not to invest, except a resale pursuant to a registration statement effective under section 485-8, or to an accredited investor pursuant to an exemption available under chapter 485;
- (B) The exemption under this paragraph shall not apply to an issuer if the issuer; any affiliated issuer; any beneficial owner of ten per cent or more of any class of the issuer's equity securities; any issuer's predecessor, director, officer, general partner, or promoter presently connected in any capacity with the issuer; and any underwriter or partner, director, or officer of the underwriter of the securities to be offered:
  - (i) Within the last five years has filed a registration statement that is the subject of a currently effective registration stop order entered by any state securities administrator or the United States Securities and Exchange Commission;
  - (ii) Within the last five years has been convicted of any criminal offense in connection with the offer, purchase, or sale of any security, or involving fraud or deceit;
  - (iii) Is currently subject to any state or federal administrative enforcement order or judgment entered within the last five years, finding fraud or deceit in connection with the purchase or sale of any security; or
  - (iv) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminary, or permanently restraining or enjoining such party from

- engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security;
- (C) Subparagraph (B) shall not apply if:
    - (i) The party subject to the disqualification is licensed or registered to judgment, or decree creating the disqualification was entered against such party;
    - (ii) Before the first offer under this exemption, the commissioner, or the court or regulatory authority that entered the order, judgment, or decree waives the disqualifications; or
    - (iii) The issuer establishes that the issuer did not know and in the exercise of reasonable care, based on a factual inquiry, could not have known that a disqualification existed under this paragraph;
  - (D) An issuer claiming the exemption under this section, within fifteen days after the first sale in this State, shall file with the commissioner a notice of transaction, a consent to service of process, a copy of the general announcement as required by section 485-24.6, and a \$200 filing fee; and
  - (E) For the purposes of this paragraph, "accredited investor" shall have the same meaning as provided in 17 Code of Federal Regulations section 230.501(a);
- (17) Any offer or sale of a security effected by a resident of Canada who is excluded from the definition of "dealer" under section 485-1(3)(E); and
- (18) Any transaction that is exempt or would be exempt under rule 701, 17 Code of Federal Regulations section 230.701, promulgated under section 3(b) of the Securities Act of 1933.

**§485-7 Securities issued by residential cooperative corporations.** In order to be entitled to the exemption provided by section 485-6(13), the issuer of a security defined in such paragraph shall make application for the exemption to the commissioner of securities on such form and containing such information as the commissioner may prescribe. If the commissioner finds that the proposed plan of business of the applicant and the proposed issuance of securities are fair, just, and equitable, that the applicant intends to transact its business fairly and honestly, and that the securities that the applicant proposes to issue and the method to be used by the applicant in issuing or disposing of the securities are not such as, in the opinion of the commissioner, will work a fraud upon the purchaser thereof; the commissioner shall issue to the applicant a permit authorizing the applicant to issue and dispose of the securities in this State in the manner provided in section 485-6(13) and in such amounts and for such consideration as the commissioner may provide in the permit. Otherwise, the commissioner shall deny the application and refuse the permit and notify the applicant in writing of such decision, and the exemption of section 485-6(13) shall not apply, subject to appeal as provided in section 485-23.

In any permit issued under this section, the commissioner may impose conditions requiring the deposit in escrow of any or all securities, the impoundment of the proceeds from the sale thereof, approval of advertising material, any of the conditions set forth in section 485-18, and such other conditions as the commissioner deems advisable for the protection of the public and the purchasers of the securities. The commissioner may act as escrow holder for securities required to be deposited in

escrow by the commissioner's order or as a necessary signatory on any account in which impounded proceeds from the sale of escrowed securities are deposited.

**§485-8 Registration of securities.** It shall be unlawful for any person to sell or offer to sell in the State, any security except of a class exempt under section 485-4 or unless sold or offered in any transaction exempt under section 485-6 or unless it is a federal covered security, unless the security has been registered by notification or by qualification as hereinafter provided. Registration of stock shall be deemed to include the registration of rights to subscribe to the stock if the notice under section 485-9 or the application under section 485-10 includes a statement that the rights are to be issued. A record of the registration of securities shall be kept in a register of securities to be kept in the office of the commissioner of securities in which register shall also be recorded any notice filings made pursuant to section 485-4.5 and any orders entered by the commissioner with respect to the securities. The register and all information with respect to the securities registered therein shall be open to public inspection.

**§485-9 Registration by notification.** (a) Securities entitled to registration by notification. The following classes of securities shall be entitled to registration by notification in the manner provided in this section:

- (1) Securities issued by a corporation, partnership, association, company, syndicate, or trust owning a property, business, or industry which has been in continuous operation not less than three years and which has shown during a period of not less than two years or more than ten years next prior to the close of its last fiscal year preceding the offering of such securities, average annual net earnings, after deducting all prior charges not including the charges upon securities to be retired out of the proceeds of sale, as follows:
  - (A) In the case of interest-bearing securities, not less than one and one-half times the annual interest charge thereon and upon all other outstanding interest-bearing obligation of equal rank;
  - (B) In the case of preferred stock, not less than one and one-half times the annual requirements on the preferred stock and on all other outstanding stock of equal rank;
  - (C) In the case of common stock not less than five per cent upon all outstanding common stock of equal rank, together with the amount of common stock then offered for sale reckoned upon the price at which the stock is then offered for sale or sold.

The ownership by a corporation, partnership, association, company, syndicate, or trust of more than fifty per cent of the outstanding voting stock of a corporation shall be construed as the proportionate ownership of the property, business, or industry of the corporation, and permits the inclusion of the earnings of the corporation applicable to the payment of dividends upon the stock so owned in the earnings of the corporation, partnership, association, company, syndicate, or trust issuing the securities sought to be registered by notification.

- (2) Bonds or notes secured by first mortgage upon real estate leased to a corporation for a term of years at a net rental sufficient to pay the interest and to retire the principal of all bonds or notes secured by the mortgage during the term of the lease, where the lease is irrevocable and is pledged under the mortgage securing the bonds or notes.
- (3) Bonds or notes secured by first mortgage on real estate in any state or territory of the United States or in the District of Columbia or in the Dominion of Canada where such real estate consists of agricultural lands used and valuable for agricultural purposes (not including oil, gas, or mining property) and where the aggregate face value of the bonds or notes, not including interest notes or coupons, secured on such property does not exceed seventy per cent of the then fair market value of the lands plus sixty per cent of the insured value of any improvements thereon.
- (4) Bonds or notes secured by first mortgage on real estate in any state or territory of the United States or in the District of Columbia or in the Dominion of Canada where such real estate consists of improved city, town, or village property and where the aggregate face value of such bonds or notes, not including interest notes or coupons, secured on such property does not exceed seventy per cent of the then fair market value of the property, including any improvements appurtenant thereto, and when the property is used principally to produce through rental a net annual income, after deducting operating expenses and taxes, or has a fair rental value after deducting operating expenses and taxes, at least equal to the annual interest plus not less than three per cent of the principal of the mortgage indebtedness.
- (5) Bonds or notes secured by a mortgage constituting a first lien on a leasehold or real estate in any state or territory of the United States or in the District of Columbia where the real estate consists of improved city, town, and village property and where the aggregate face value of the bonds or notes, not including interest notes or coupons secured by the first mortgage does not exceed seventy per cent of the then fair market value of the leasehold and when the property is so used as to produce through rental a net annual income after deducting operating expenses and taxes, or has a fair rental value after deducting operating expenses and taxes, at least equal to the annual interest plus not less than three per cent of the principal of the mortgage indebtedness; provided, all advertisements, circulars, and letters advertising the sale of the bonds or notes, and all receipts of payments therefor, and the bonds and notes shall bear in bold type not less than eighteen points upon the face thereof a legend stating that the bonds or notes are secured by mortgage on a leasehold, and all other written or printed offerings shall contain a statement to the same effect.
- (6) Bonds or notes secured by a first mortgage upon real estate in any state or territory of the United States or in the District of Columbia:
  - (A) Where the mortgage is a first mortgage upon city, town, or village real estate, or leaseholds, upon which real estate or leaseholds a building or buildings is or are about in good faith forthwith to be erected according to the expressed terms of the mortgage;
  - (B) And where reasonable adequate provision has been made for financing the full completion of the building clear of any lien superior to the mortgage;

- (C) And where the aggregate face value of the bonds or notes, not including interest notes or coupons, secured by the first mortgage does not exceed seventy per cent of the fair market value of the mortgaged property, including the building or buildings to be erected thereon;
- (D) And where the mortgaged property is to be used principally to produce through rental a net annual income, after deducting operating expenses and taxes, or will have a fair rental value, after deducting operating expenses and taxes, at least equal to the annual interest plus not less than three per cent of the principal of such mortgage indebtedness;

Provided, that all advertisements, circulars, and letters advertising the sale of the bonds or notes and all receipts of payments therefor shall bear in bold type not less than eighteen points upon the face thereof a legend stating that the bonds or notes are construction bonds or notes and all other written or printed offerings of the bonds or notes shall bear a statement to the like effect;

And provided further, that where the bonds or notes are secured wholly or partly by first mortgage on leaseholds, the value of the leaseholds is required to meet the ratio of property value to face value obligations above in this subsection provided, and all advertisements, circulars, and letters advertising the sale of the bonds or notes, and all receipts of payments therefor, and the bonds and notes shall bear in bold type not less than eighteen points upon the face thereof a legend stating that the bonds or notes are secured wholly or partly by mortgage on a leasehold as the case may be, and all other written or printed offerings of the bonds or notes shall contain a statement to the same effect.

- (7) Bonds or notes secured by first lien on collateral pledged as security for the bonds or notes with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state or territory of the United States, which collateral shall consist of one or more of the following:
  - (A) A principal amount of first mortgage bonds or notes conforming to the requirement of any one or more of paragraphs (2), (3), (4), (5), and (6) of this section;
  - (B) A principal amount of obligations secured as hereinafter in this subsection provided;
  - (C) A principal amount of obligations of the United States;
  - (D) Cash; the aggregate to be not less than one hundred per cent of the aggregate principal amount of all bonds or notes secured thereby. The portion of such collateral referred to in clause (B) shall consist of obligations secured by a first lien on a principal amount of first mortgage bond or notes conforming to the requirements of any one or more of paragraphs (2), (3), (4), (5), and (6) of this section, or a principal amount of obligations of the United States or cash equal to not less than one hundred per cent of the aggregate principal amount of the obligation so secured thereby, and all such pledged securities including cash so securing the obligations shall have been deposited with a bank or trust company

as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state or territory of the United States.

- (8) The commissioner of securities may receive registration by notification of other securities which are substantially of the same quality and description as one or more of the specific classes above named, although not specifically heretofore described.

(b) Procedure for registration by notification. Securities entitled to registration by notification shall be registered by the filing by the issuer or by any registered dealer interested in the sale thereof, in the office of the commissioner, of a statement with respect to the securities containing the following:

- (1) Name of issuer, location and, if incorporated, place of incorporation;
- (2) A brief description of the securities, including the amount of the issue;
- (3) Amount of securities to be offered in the State;
- (4) A statement of the amount of the issuer's income, expenses, and fixed charges during the last three years, certified to by a public accountant;
- (5) A balance sheet showing the amount and general character of its assets and liabilities as of the last fiscal year immediately preceding, certified to by a public accountant;
- (6) A brief statement of the facts which show that the securities fall within one of the classes in this section defined;
- (7) The price at which the securities are to be offered for sale to the public;
- (8) A statement that the issuer has complied with all the laws of the United States relating to the sale of securities;
- (9) Such further information as the commissioner may require.

All of the statements, exhibits, and documents of every kind required by the commissioner under this section, except properly certified public documents, shall be verified by the oath of the applicant or of the issuer in such manner and form as may be required by the commissioner.

In the case of securities falling within the class defined by subsection (a)(1) or (2), a copy of the circular to be used for the public offering shall be filed in the office of the commissioner with the statement or within two days thereafter or within such further time as the commissioner allows.

In the case of securities falling within the classes defined by subsection (a)(3), (4), (5), (6), and (7), the circular to be used for the public offering shall be filed with the statement.

The filing of such statement in the office of the commissioner and the payment of the fee hereinafter provided shall constitute the registration of the security. Upon such registration, the securities may be sold in the State by any registered dealer giving notice in the manner provided in section 485-14(o) subject to the further order of the commissioner as hereinafter provided.

At the time of filing the statement, as prescribed in this section, the applicant shall pay to the commissioner a fee of one-twentieth of one per cent of the aggregate offering price of the securities to be offered in the State for which the applicant is seeking registration, but in no case shall the fee be more than \$500.



**§485-10 Registration by qualification; application to commissioner, etc.** (a) All securities required by this chapter to be registered before being sold in the State and not entitled to registration by notification shall be registered only by qualification in the manner provided by this section.

(b) The commissioner of securities shall receive and act upon applications for registration of securities by qualification and may prescribe forms upon which the commissioner may require the applications to be submitted. Applications shall be in writing and shall be duly signed by the applicant and sworn to by any person having knowledge of the facts and shall be filed in the office of the commissioner and may be made either by the issuer of the securities for which registration is applied for, or by any registered dealer desiring to sell the same within the State. Application for registration of securities by qualification shall be made by the filing in the office of the commissioner of the following:

- (1) An application for registration which, in the case of an offering or distribution by or in whole or in part for the account of an issuer, shall include the information specified in subparagraphs (A) through (E) of this paragraph (1), and in the case of a nonissuer offering or distribution shall contain such of the information specified in subparagraphs (A) through (E) of this paragraph (1) as the commissioner may prescribe, together, in every case, with such other information as the commissioner prescribes:
  - (A) Name and address of issuer and address of issuer's principal office in the State, if any;
  - (B) Title of securities to be registered and total amount of each class of the securities to be offered in the State and elsewhere;
  - (C) Amount of each class of securities to be offered in the State, offering price per unit and in the aggregate and the amount of the registration fee;
  - (D) If a registration statement as to the securities has been filed under the Securities Act of 1933, the effective date of registration statement, if effective, and a statement as to whether any stop order has been made with respect thereto pursuant to the Securities Act of 1933, or whether any notice of intent to issue a stop order has been given or to the best knowledge of the applicant is threatened;
  - (E) The states, territories, or other jurisdiction, if any, which have refused by order or otherwise to authorize the sale of the securities to the public or have revoked or suspended the right to sell the securities or in which any proceeding for the revocation or suspension of such right is pending, or in which an application for qualification has been withdrawn.
- (2) In the case of an offering or distribution by or in whole or in part for the account of an issuer, a copy of each of the following, and in the case of a nonissuer offering or distribution, copies of such of the following as the commissioner prescribes:
  - (A) The issuer's charter or articles of association or other instrument of organization, together with all amendments thereto, certified by the officer of the State of the issuer's incorporation or organization having custody thereof, if not already on file in the office of the commissioner;
  - (B) The issuer's bylaws, together with all amendments thereto, certified by the secretary or any other duly authorized officer of the issuer;

- (C) The indenture, if any, and all supplements thereto, under which the securities are to be issued;
- (D) The basic underwriting agreement, if any, and any agreement or agreements among underwriters and dealers pertaining to the distribution of the securities within the State;
- (E) An opinion or opinions of counsel as to the legality and validity of the securities and their issuance;
- (F) A specimen copy of each certificate to be registered.

Any of the foregoing documents may be submitted in preliminary form, clearly marked as such, in which case a definitive copy of each shall be filed promptly after execution, adoption or filing, as the case may be.

- (3) A prospectus which shall have set forth on the outside front cover page, in capital letters in type as large as that used generally in the body of the prospectus, the statement that "NEITHER THIS PROSPECTUS NOR THE SECURITIES DESCRIBED HEREIN HAVE BEEN APPROVED OR DISAPPROVED BY THE COMMISSIONER OF SECURITIES OF THE STATE OF HAWAII NOR HAS THE COMMISSIONER PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS", and in the case of an offering or distribution by or in whole or in part for the account of an issuer shall include the information specified in subparagraphs (A) through (P) of this paragraph (3), or in the case of a nonissuer offering or distribution shall contain such of the information specified in subparagraphs (A) through (P) of this paragraph (3) as the commissioner may prescribe, together, in every case, with such other information as the commissioner may prescribe:

- (A) The name and address of the issuer, the name of the jurisdiction under the laws of which it was organized, and the date of its organization;
- (B) A statement in tabular form of the following information on a per share or other unit basis: offering price to the public; underwriting discounts or commissions; and proceeds to the issuer or other persons;
- (C) A statement of the amount of securities offered, the aggregate offering price to the public, the aggregate underwriting discounts or commissions, an estimate of the amount of expenses of the issuer and the amount of expenses of the underwriters to be borne by the issuer, and the aggregate proceeds to the issuer or securities holders for whose accounts the securities are offered;
- (D) If any of the securities are to be offered for the account of any person other than the issuer, the name and address of each such security holder, the total amount the security holder owns, and the amount to be offered for the security holder's account;
- (E) If the securities are not to be offered for cash, a statement of the basis on which the offering is to be made;
- (F) A brief description of the method by which the securities are to be offered and if the offering is to be made by or through underwriters, the name and address of each underwriter and the amount of the participation of each underwriter, with a statement of any material relationship between the issuer and such underwriter;

- (G) A reasonably itemized statement of the purposes for which the net cash proceeds to the issuer from the sale of the securities are to be used and the amount to be used for each such purpose, indicating in what order of priority the proceeds will be used for the respective purposes;
- (H) A description of any arrangements for the return of funds to subscribers if all of the securities to be offered are not sold, or if there are no such arrangements, a statement to that effect;
- (I) A brief description of the securities to be offered, including:
  - (i) In the case of shares the par or stated value, if any; the rate of dividend, if fixed, and whether cumulative or noncumulative; the preference, if any; and if convertible, the conversion rate;
  - (ii) In the case of debt securities, the rate of interest; the date of maturity or, if the issue matures serially, a brief indication of the serial maturities; if the issue is redeemable before maturity, a brief statement of the redemption date or dates and price or prices; if payment of principal or interest is contingent, an indication of the contingency; a brief indication of the priority of the issue; and if convertible, the conversion rate;
  - (iii) In the case of any other kind of security, appropriate information of a comparable character;
- (J) A brief description of the business or proposed business of the issuer, including:
  - (i) The nature of the issuer's present or proposed products or services, the principal market therefor, and the length of time the issuer has been in commercial production;
  - (ii) The location and general character of the plants or other physical properties held or proposed to be acquired by the issuer and the nature of the title under which such properties are held or proposed to be held;
  - (iii) If the issuer intends to exploit or develop any new invention or process, a statement of how the invention or process is to be applied commercially and whether or not it is covered by any patent, issued or pending, identifying by date and serial number any such patent or patent application;
- (K) The names and residence addresses of all directors and officers of the issuer and of any person or persons controlling the issuer and, if the issuer was organized within the last three years, the names and addresses of all promoters of the issuer;
- (L) A description of all direct and indirect interests, by security holdings or otherwise, of each director and officer of the issuer and, if the issuer was organized within the last three years, of each promoter of the issuer:
  - (i) In the issuer or its affiliates;
  - (ii) In any material transactions within the past two years or in any material proposed transactions to which the issuer or any of its predecessors or affiliates was or is to be a party, stating the cost to such persons of any

property or services for which payment by or for the account of the issuer has been or is to be made;

- (M) If the issuer was organized within the last three years, a statement of the percentage of outstanding securities of the issuer which will be held by directors, officers, and promoters as a group, and the percentage thereof which will be held by the public if all of the securities to be offered are sold, and the respective amounts of cash (including cash expended for property transferred to the issuer) paid therefor by such group and by the public;
  - (N) A brief description of all options or warrants presently outstanding or proposed to be granted to purchase securities of the issuer, including the names of the holders thereof, the cost thereof to the holders, the terms and conditions on which they may be exercised, and the price at which the securities may be acquired pursuant thereto;
  - (O) A balance sheet of the issuer at the close of the issuer's last fiscal year preceding the date of filing of the prospectus and a profit and loss statement and analysis of surplus for the fiscal year ended at the date of the balance sheet, all certified by a public accountant, together with a balance sheet of the issuer as of a date within ninety days prior to the date of filing of the prospectus and a statement of profit and loss for the period from the close of the last preceding fiscal year to the date of the balance sheet, both verified by a duly authorized officer of the issuer, or, if the issuer has been in existence for less than one year, a balance sheet of the issuer as of a date within ninety days prior to the date of filing and a statement of profit and loss for the period from the date of the issuer's organization to the date of the balance sheet, both certified by a public accountant;
  - (P) No prospectus filed pursuant hereto shall set forth in any manner any estimate or projection of future income, earnings, or profits of the issuer or any subsidiary, parent, or affiliate of the issuer, unless clearly identified as an estimate and unless the basis of estimation is clearly set forth.
- (4) If the securities for which application for registration is being made have been or are to be registered under the Securities Act of 1933, there may be filed in lieu of the prospectus prescribed by paragraph (3) of subsection (b) of this section, the definitive prospectus of the issuer filed under the Securities Act of 1933, if the same shall be dated within one hundred and twenty days of the application for registration under this section.

(c) With respect to securities required to be registered by qualification under this section, the commissioner may, by order duly recorded, fix the maximum amount of commission or other form of remuneration to be paid in cash or otherwise, directly or indirectly, for or in connection with the sale or offering for sale of the securities in the State.

(d) At the time of filing the application for registration as prescribed in this section, the applicant shall pay to the commissioner, a fee of one-tenth of one per cent of the aggregate offering price of the securities to be sold in the State for which the applicant is seeking registration, but in no case shall the fee be less than \$250 nor more than \$2,500.

(e) If, upon examination of any application and the documents required to be filed therewith, the commissioner finds that the sale of the security referred to therein would not be fraudulent and would not work or tend to work a fraud upon the purchaser and that the enterprise or business of the issuer is not based upon unsound business principles, the commissioner shall record the registration of the security in the register of securities and thereupon the security so registered may be sold by the issuer or any registered dealer who has notified the commissioner of the issuer's or dealer's intention so to do in the manner provided in section 485-14, subject, however, to this chapter and to the further order of the commissioner as hereinafter provided.

(f) Registration under this section is effective for a period of one year and may be renewed for additional periods of one year by filing, by a date not later than fifteen days prior to expiration of registration, a prospectus meeting the requirements of subsection (b)(3) or (4), and containing information as of a date not more than ninety days prior to the date of filing, together with the payment of a renewal fee of \$250.

(g) With respect to options on commodity futures contracts the following shall be observed:

(1) An application for registration of options on commodities futures contracts shall contain the same information specified in paragraph (b) of this section, except in the case of subparagraph (b)(3).

(2) The prospectus shall contain the following information in lieu of the information required in subparagraph (b)(3) of this section:

(A) Name and address of issuer and issuer's principal office in the State, if any;

(B) Total dollar value of contracts to be offered, specifying the commodities involved;

(C) How the offering price is calculated;

(D) A brief description of the method by which the contracts are to be offered, and if the offering is to be made through underwriters, the name and address of each underwriter and the amount of the participation of each underwriter with a statement of any material relationship between the issuer and underwriter;

(E) The policy which the issuer plans to follow to assure that it will have sufficient funds to pay its investors upon the exercise of option contracts;

(F) Summary of the terms and conditions of the customers agreement;

(G) Information requested by the following provisions in paragraph (b)(3) shall be stated: (I), (J), (K), (L), (N), and (O);

(H) Such information that may be required by rules and regulations.

(3) No option contracts shall be offered or sold in the State under this section, unless the issuer has a paid-in capital of at least \$100,000, and unless its net cash value is 1.25 times its open option cash position.

(4) As used in this section, the following meanings shall apply:

(A) "Option on a commodity futures contract" means right to buy or sell a commodity futures contract at a fixed price during a predetermined period of time;

(B) "Net issuers cash value" means all cash in customers accounts, less customers accounts payable, plus net value of issuers hedging account;

- (C) "Hedging account" means account which issuer maintains to buy or sell commodity futures as a protection against loss due to price fluctuation;
- (D) "Open option cash position" means the value of all outstanding open options.
- (5) The net issuers cash value and the open option cash position shall be compiled at the end of each business day. In the event the issuer's cash value goes below one hundred twenty-five per cent of its open option cash position, the issuer shall be prohibited to sell new options and will be limited to liquidating its existing options and it shall immediately notify the director of commerce and consumer affairs.
- (6) Options on commodity futures contracts registered with the Securities and Exchange Commission under the Securities Act of 1933, shall be exempt from registration under this section.

#### **§485-11 REPEALED.**

**§485-11.5 Request for private consultant.** Upon the filing of the application for registration of securities as provided in section 485-9 or 485-10, or application for exemption of securities as provided in section 485-7, the applicant may, in writing, request that the registration be prepared by a private consultant, and when requested the commissioner may contract with private consultants for such review. The cost of the review shall be borne by the applicant; provided that upon payment of the cost of review, the applicant shall be reimbursed one-half of the respective filing fee.

**§485-12 Commissioner as agent to accept service; consent to; actions in what circuit; notice to issuer.** (a) Upon any notice filing under section 485-4.5, any application for registration by notification under section 485-9 made by an issuer, or any application for registration by qualification under section 485-10, whether made by an issuer or registered dealer, there shall be filed with the initial notice filing or the application the irrevocable written consent of the issuer that in suits, proceedings, and actions growing out of the violation of this chapter, the service on the commissioner of securities of any notice, process, or pleading therein, authorized by the laws of the State, shall be as valid and binding as if due service had been made on the issuer.

(b) Any action shall be brought either in the circuit of the plaintiff's residence or in the circuit in which the commissioner has the commissioner's office.

(c) In case any process or pleadings mentioned in this chapter are served upon the commissioner, it shall be by duplicate copies, one of which shall be filed in the office of the commissioner and another immediately forwarded by the commissioner by registered mail to the principal office of the issuer against which the process or pleadings are directed.

**§485-13 Revocation of registration of securities; suspension during investigation; hearing.** (a) The commissioner of securities may issue a stop order denying effectiveness to, or

suspending, or revoking the effectiveness of, any registration if the commissioner finds that the order is in the public interest and that:

- (1) The registration statement as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment under section 485-10(f) as of its effective date is incomplete in any material respect or contains any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;
- (2) This chapter or any rule, order, or condition lawfully imposed under this chapter has been wilfully violated, in connection with the offering, by (A) the person filing the registration statement, (B) the issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person, directly or indirectly, controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer, or (C) any underwriter;
- (3) The security registered or sought to be registered is the subject of an administrative stop order or similar order or a permanent or temporary injunction of any court of competent jurisdiction entered under any other federal or state act applicable to the offering; but (A) the commissioner may not institute a proceeding against an effective registration statement under this clause more than one year from the date of the order or injunction relied on, and (B) the commissioner may not enter an order under this clause on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts which would currently constitute a ground for a stop order under this section;
- (4) The issuer's enterprise or method of business includes or would include activities which are illegal where performed;
- (5) The offering has worked or tended to work a fraud upon purchasers or would so operate;
- (6) The offering has been or would be made with unreasonable amounts of options, underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation;
- (7) When a security is sought to be registered by notification, it is not eligible for such registration; or
- (8) The applicant or registrant has failed to pay the proper filing fee; but the commissioner may enter only a denial order under this clause and the commissioner shall vacate any such order when the deficiency has been corrected.

The commissioner may not enter a stop order against an effective registration statement on the basis of a fact or transaction known to the commissioner when the registration statement became effective.

(b) The commissioner may by order summarily postpone or suspend the effectiveness of the registration statement pending final determination of any proceeding under this section. Upon the entry of the order, the commissioner shall promptly notify each person specified in subsection (c) that it has been entered and of the reasons therefor and that within fifteen days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the

commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing to each person specified in subsection (c), may modify or vacate the order or extend it until final determination.

(c) No stop order may be entered under any part of this section except the first sentence of subsection (b) without (1) appropriate prior notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered, (2) opportunity for hearing, and (3) written findings of fact and conclusions of law.

(d) The commissioner may vacate or modify a stop order if the commissioner finds that the conditions which prompted its entry have changed or that it is otherwise in the public interest to do so.

**§485-14 Registration of dealers, investment advisers, salespersons and investment adviser representatives.** (a) It is unlawful for any person to transact business in this State as a dealer, investment adviser, salesperson, or investment adviser representative unless registered under this chapter. However, nothing in this chapter shall prevent the commissioner from participating, in whole or in part, in the Central Registration Depository system, in cooperation with the National Association of Securities Dealers, Inc., other states, and the United States, to the extent participation is deemed to be in the public interest of this State.

(b) Eligibility for registration as a dealer. To be eligible for registration as a dealer an applicant shall have had (or if the applicant is a partnership or corporation have at least one partner, officer, or employee who has) at least one year of experience as a full-time security salesperson or experience as a security salesperson on a part-time basis found by the commissioner of securities to be substantially equivalent thereto; provided that this experience requirement shall not apply to issuers of securities applying for registration as dealers for the sole purpose of issuing and selling securities issued by them.

(c) Application for registration as a dealer. An application for registration as a dealer shall be filed with the office of the commissioner in such form as the commissioner may prescribe by rule or order. The commissioner may also require such additional information regarding the applicant's previous history, record, and association including without limitation the following:

- (1) Disclosure of any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;
- (2) The applicant's financial condition and history;
- (3) Disclosure as to whether the dealer, or any person employed by or associated in business with the dealer, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of the dealer under section 485-15; and
- (4) Any other information as the commissioner deems necessary to establish the qualifications of the applicant.

There shall be filed with such application an irrevocable written consent to the service of process upon the commissioner in actions against the dealer in manner and form prescribed by the commissioner by rule or order.

(d) Eligibility for registration as an investment adviser. To be eligible for registration under this chapter, an investment adviser shall have complied with the mandatory provisions of this section,



and shall take and pass an oral or written examination, or both, prescribed by the commissioner, to test the applicant's knowledge of the securities business; provided that the commissioner may by rule set forth exemptions to the examination requirement.

(e) Registration of investment advisers. An application for registration, as an investment adviser in such form as the commissioner may prescribe by rule or order shall be filed with the office of the commissioner. The commissioner may also require additional information regarding the applicant's previous history, record, and association, including without limitation the following:

- (1) A balance sheet certified by an independent public accountant and other certified financial statements if the investment adviser has custody of or discretionary authority over client money, securities, or other assets, or an unaudited, verified balance sheet and financial statements if the investment adviser has no custody of or discretionary authority over client money, securities, or other assets. If the investment adviser maintains its principal place of business in a state other than this State and the investment adviser is registered in that state and in compliance with its financial reporting requirements, this requirement shall be deemed satisfied by the investment adviser filing with the commissioner a copy of those financial statements, if any, that are required to be filed by the adviser in the state where it maintains its principal place of business;
- (2) Disclosure as to whether the investment adviser, or any person employed by or associated in business with the investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of the investment adviser under section 485-15;
- (3) Other information as to the applicant's previous history, record, and association that the commissioner deems necessary including:
  - (A) Disclosure of any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;
  - (B) The applicant's financial condition and history; and
  - (C) Any additional information that the commissioner deems necessary to establish the applicant's qualifications.

To the extent appropriate, the commissioner shall use uniform registration application forms adopted by the North American Securities Administrators Association, the Securities and Exchange Commission, or any national securities exchange or national securities association registered under the Securities Exchange Act of 1934 for purposes of this section; and shall, to the extent appropriate, permit the electronic filing of such forms through the Central Registration Depository or the Investment Adviser Registration Depository of the National Association of Securities Dealers.

(f) Approval, bond. If the commissioner finds that the applicant for registration as a dealer is eligible for such registration, then the commissioner shall register the applicant as a dealer upon payment of the fee hereinafter provided and, except as otherwise provided in this subsection, upon the dealer's filing of a bond in the sum of \$5,000 running to the State conditioned upon the faithful compliance with this chapter by the dealer and by all salespersons registered by the dealer while acting for the dealer. The bond shall be executed as a surety by a surety company authorized to do business in the State; provided that no bond is required of or from any such applicant if the applicant at the time of making application is a member of any recognized stock or bond exchange which has been in existence

for a period of five years prior to April 29, 1931; provided further that no bond is required of a dealer if the aggregate par value of the securities to be sold is less than \$5,000 or in the case of no par value stock, if the price at which the stock is to be offered to the public is less than \$5,000 if the person selling or offering the securities for sale to the public notifies the commissioner in writing of the person's intention to make the sale and after the sale files with the commissioner a statement of the kind and amount of stock sold and the price received therefor, but where the aggregate par value of the securities or the price at which the stock is to be offered to the public is less than \$5,000 no more than one such sale or offering shall be allowed within a period of one year; provided further that in lieu of the above bond, any dealer may deposit and keep deposited with the commissioner cash in the amount of \$5,000 or securities to be approved by the commissioner having a market value at all times of not less than \$5,000 which cash or securities shall be held in trust to fulfill the same terms and conditions as in the case of a bond required by this section, which cash or securities may be withdrawn at any time subject to the deposit in lieu thereof of cash or other securities of equal value, or upon the filing of a bond as provided in this section, and which cash or securities will be so held in trust for a period of two years beyond the revocation or termination of the registration of the dealer depositing the same. No bond shall be required under this section or under this chapter of any dealer that is registered under the Securities Exchange Act of 1934.

(g) Investment adviser's approval; bond, insurance required. If the commissioner finds that the applicant for registration as an investment adviser is eligible for registration, the commissioner shall register the investment adviser upon a payment of a fee hereinafter provided, and except as otherwise provided in this subsection, upon the investment adviser filing a bond in the sum of \$50,000 with the State as the obligee. The bond requirement shall be \$5,000 if the adviser does not have custody of or discretionary authority over client money, securities, or other assets. The bond shall be conditioned upon the faithful compliance with this chapter by the investment adviser. The bond shall be executed as a surety by a surety company authorized to do business in the State; provided that in lieu of the above bond any investment adviser may deposit and keep deposited with the commissioner cash in the applicable amount of \$50,000 or \$5,000 or securities to be approved by the commissioner having a market value at all times of not less than \$50,000 or \$5,000 which cash or securities shall be held in trust to fulfill the same terms and conditions as in the case of a bond required by this section, which cash or securities may be withdrawn at any time subject to the deposit in lieu thereof of cash or other securities of equal value, or upon the filing of a bond as provided in this section, and which cash or securities will be so held in trust for a period of two years beyond the revocation or termination of the registration of the investment adviser depositing the same. In addition, except as otherwise provided in this subsection, the investment adviser shall file with the commissioner a certificate of insurance which indicates that the investment adviser's business is insured for errors and omissions for at least \$100,000 per occurrence with a \$200,000 aggregate for those with less than two years experience and a \$500,000 aggregate for those with two or more years of experience for the protection of the investment adviser's client, or shall meet an alternative requirement which also provides for the protection of the client of the investment adviser, as determined by rules adopted by the commissioner. This subsection shall not apply to any investment adviser that maintains its principal place of business in a state other than this State; provided that the investment adviser is registered in the state where it maintains its principal place of business and is in compliance with the state's net capital and bonding requirements, if any.

(h) Eligibility for registration as a salesperson. To be eligible for registration under this chapter a salesperson shall have complied with the mandatory provisions of this section, shall be designated as a salesperson by a registered dealer, and shall take and pass an oral or written examination, or both, prescribed by the commissioner, to test the salesperson's knowledge of the securities business. Every person required to take such an examination shall, at or before the time the person takes the same, pay a fee as prescribed by the commissioner. However, registration is not required of a salesperson who represents a dealer in effecting transactions in this State limited to those transactions described in section 15(h)(2) of the Securities Exchange Act of 1934. No person shall be designated as a salesperson by, or shall act as a salesperson for, more than one registered dealer.

(i) Registration of salespersons. An application for registration as a salesperson shall be filed by a registered dealer with the office of the commissioner in such form as the commissioner may prescribe by rule or order. The commissioner may also require additional information regarding the applicant's history, record, and association including without limitation the following:

- (1) Disclosure of any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;
- (2) The applicant's financial condition and history;
- (3) Disclosure as to whether the salesperson or any person associated in business with the salesperson is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of the salesperson under section 485-15; and
- (4) Any additional information that the commissioner deems necessary to establish the applicant's qualifications.

If the commissioner finds a salesperson designated by any registered dealer to be eligible for registration as a salesperson, the commissioner shall register the person as a salesperson upon the payment of the fee hereinafter provided.

(j) Eligibility for registration as an investment adviser representative. To be eligible for registration under this chapter, an investment adviser representative shall have complied with the mandatory provisions of this section, shall be designated as a representative by a federal covered adviser or investment adviser or a registered investment adviser, and shall take and pass an oral or written examination, or both, prescribed by the commissioner, to test the representative's knowledge of the investment advisory and securities business; provided that the commissioner may by rule set forth exemptions to the examination requirement. No person shall be designated as an investment adviser representative by, or shall act as an investment adviser representative for, more than one federal covered adviser or registered investment adviser.

(k) Registration of investment adviser representative. An application for registration as an investment adviser representative shall be filed with the office of the commissioner in such form as the commissioner may prescribe by rule or order. The commissioner may also require additional information regarding the applicant's history, record, and association including without limitation the following:

- (1) Disclosure of any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;
- (2) The applicant's financial condition and history;

- (3) Disclosure as to whether the salesperson, or any person associated in business with the salesperson is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of the salesperson under section 485-15; and
- (4) Any additional information that the commissioner deems necessary to establish the applicant's qualifications.

If the commissioner finds an investment adviser representative designated by any federal covered adviser or investment adviser to be eligible for registration as an investment adviser representative, the commissioner shall register the person as an investment adviser representative upon the payment of a fee hereinafter provided.

(l) Recording; duration; renewal; fee. The names and business addresses of all persons registered under this chapter as dealers, investment advisers, salespersons, or investment adviser representatives and all orders with respect thereto shall be open to public inspection. Except as otherwise provided by the commissioner by rule or order, every registration for dealers, investment advisers, salespersons, and investment adviser representatives under this section shall expire on December 31 of each year unless renewed prior to expiration. Applications for renewals shall be made not less than thirty nor more than sixty days before the end of the year, unless the dealer, investment adviser, salesperson, or investment adviser representative is registered with the commissioner through the Central Registration Depository system or the Investment Adviser Registration Depository in which case the renewal shall be filed with the commissioner as provided through that system. Any applicant for renewal of a dealer, investment adviser, salesperson, or investment adviser representative registration who does not submit the application within the time prescribed by this section shall pay a penalty of one hundred per cent of the applicable renewal fee. Any applicant for renewal of a dealer or investment adviser registration who submits the application after December 31 shall be required to reapply as a new dealer or investment adviser. The registration of any dealer, investment adviser, salesperson, or investment adviser representative may be terminated prior to its expiration by written notice filed with the commissioner by the registered dealer, registered salesperson, registered investment adviser, or registered investment adviser representative concerned, and the termination shall take effect as of the date and time of filing of the notice. The fee for registration and for each renewal shall be \$200 in the case of dealers, \$100 in the case of investment advisers, and \$50 in the case of salespersons and investment adviser representatives.

(m) Changes. If any information contained in an application for registration filed with the commissioner under this chapter becomes inaccurate or changes, the registrant shall promptly file a correcting amendment with the commissioner. If the registrant is a salesperson or investment adviser representative, the dealer or investment adviser with which such registrant is affiliated or employed by shall file the amendment with the commissioner.

(n) Notice of intent to offer. Every registered dealer who intends to offer any security of any issue registered or to be registered shall notify the commissioner in writing of the dealer's intention to do so. The notice shall contain the name of the dealer and shall state the name of the security to be offered for sale, and whenever a dealer has prepared such notice and has forwarded the same by registered mail, postage prepaid, and properly addressed to the commissioner, such dealer, as to the contents of the notice and the filing thereof, is deemed to have complied with the requirements of this subsection.

(o) Issuers as dealers. Any issuer of a security required to be registered under this chapter selling such securities (other than in exempt transactions as defined in section 485-6), and any issuer of an exempt security as defined in section 485-4(9) and (10) offering such securities (other than (1) in exempt transactions as defined in section 485-6, or (2) through a dealer registered pursuant to this chapter) shall file with the commissioner a bond, or deposit securities or cash in an amount, based on the total capitalization, to be determined by the commissioner in the commissioner's discretion, which amount, however, shall not be less than \$5,000, nor more than \$25,000, subject also to the same conditions as herein prescribed in the case of dealers, and may appoint salespersons in the manner herein prescribed in the case of dealers.

(p) Capital requirement for dealers and investment advisers who have custody of or discretionary authority over client money, securities, or other assets. Except as otherwise provided in this subsection, the commissioner may by rule require a minimum capital requirement for registered dealers which shall not be less than \$5,000 in the case of dealers and prescribe a ratio between net capital and aggregate indebtedness. This subsection shall not apply to any dealer that is registered under the Securities Exchange Act of 1934. The commissioner may by rule require a net worth requirement which shall not be less than \$5,000 for investment advisers. This subsection shall not apply to any investment adviser that maintains its principal place of business in a state other than this State; provided that the investment adviser is registered in the state where it maintains its principal place of business and is in compliance with that state's net worth or net capital requirements, if any.

(q) A registered broker dealer or investment adviser may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee for registration of a successor.

**[§485-14.2] Withdrawal.** (a) An application for registration as a dealer, investment adviser, salesperson, or investment adviser representative, may be withdrawn without prejudice by the applicant upon notice to the commissioner in such form as the commissioner may prescribe before the registration becomes effective, unless a proceeding under section 485-15 is pending.

(b) Withdrawal from registration as a dealer, investment adviser, salesperson, or investment adviser representative shall be effective ninety days after receipt by the commissioner of an application to withdraw, or at such earlier time as the commissioner may allow, unless:

- (1) A proceeding under section 485-15 against the registered person is pending when the application to withdraw is received or is instituted within ninety days thereafter; or
- (2) Additional information regarding the application to withdraw is requested by the commissioner within ninety days after the application is filed.

(c) If a proceeding is pending or instituted under section 485-15 or if additional information is requested, withdrawal shall be effective at the time and upon the conditions imposed by order of the commissioner. If no proceeding is pending or instituted under section 485-15 or if no additional information is requested and withdrawal becomes effective, the commissioner may institute a proceeding under section 485-15 within two years after the withdrawal became effective and enter an order as of the last date on which registration was effective.

(d) Unless another date is specified by the federal covered adviser, withdrawal of a notice filing by a federal covered adviser becomes effective upon receipt by the commissioner of notice from the adviser of the withdrawal.

**[§485-14.3] Notice filing requirements for federal covered advisers.** It is unlawful for a person to transact business in this State as a federal covered adviser unless the person has filed with the commissioner a copy of those documents that have been filed by the federal covered adviser with the Securities and Exchange Commission that the commissioner, by rule or otherwise, requires to be filed, together with a consent to service of process and a filing fee in the amount specified for investment advisers under section 485-14(l). This filing shall be effective upon receipt and, unless renewed prior to expiration, shall expire on December 31 of each odd-numbered year. It may be renewed by filing with the commissioner those documents that have been filed with the Securities and Exchange Commission that the commissioner, by rule or otherwise, requires to be filed, together with a renewal fee in an amount specified for investment advisers under section 485-14(l). The commissioner may require a federal covered adviser who has filed under this chapter to file any amendments filed with the Securities and Exchange Commission with the commissioner. This filing may be terminated by filing a written notice of termination with the commissioner. The commissioner, by rule or otherwise, may waive any or all of the provisions of this section.

**§485-14.5 Variable annuities;exemption.** (a) Notwithstanding the requirements of section 485-14, no issuer, dealer, or salesperson shall be required to be registered under this chapter in order to be qualified to sell variable annuities provided the following requirements are met:

- (1) The salesperson is:
  - (A) Appointed by a general agent who is appointed by a life insurance company admitted to do life insurance and annuity business in this State;
  - (B) Properly licensed by the insurance commissioner to sell life insurance;
  - (C) Properly registered with the National Association of Securities Dealers, Inc. in a category of registration that authorizes the salesperson to sell variable annuities; and
  - (D) Associated with a dealer that is a registered broker/dealer with the Securities and Exchange Commission and a member of the National Association of Securities Dealers, Inc.;
- (2) The dealer is a registered broker/dealer with the Securities and Exchange Commission and a member of the National Association of Securities Dealers, Inc. authorized to sell only variable annuities and other insurance products, and must sell only through a salesperson who satisfies the criteria of paragraph (1);
- (3) The issuer is a life insurance company admitted to do life insurance and annuity business in this State; and
- (4) The issuer and dealer are parent, subsidiary, or related companies through common ownership.

(b) The exemption provided under this section shall be limited to the sale of variable annuities and other variable insurance products. The sale of any other security shall constitute a violation of this chapter. The commissioner retains full powers to inspect the records of any dealer pursuant to section 485-16.

**§485-15 Denial, revocation of dealers', investment advisers', salespersons', and investment adviser representatives' registration; suspension during investigation, etc.** Upon the finding of errors in a registration statement or the filing of complaints by consumers or by any government agency, the commissioner may conduct an investigation of the applicant or registrant and the commissioner may deny an application for registration, revoke or suspend any registration, or limit or impose conditions on the securities activities that a registrant may conduct in this State, if after reasonable notice and a hearing the commissioner determines that the applicant or registrant:

- (1) Has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;
- (2) Has violated or failed to comply with any provision of this chapter or any rule or order under this chapter;
- (3) Has been convicted, within the past ten years, of any misdemeanor involving a security or any aspect of the securities business, or any felony;
- (4) Is permanently or temporarily enjoined by any court of competent jurisdiction for engaging in or continuing any conduct or practice involving any aspect of the securities business;
- (5) Is the subject of an order of the commissioner denying, suspending, or revoking registration as a dealer, investment adviser, salesperson, or investment adviser representative;
- (6) Is the subject of an order entered within the past five years by the securities administrator of any other state or by the Securities and Exchange Commission denying or revoking registration as a dealer, investment adviser, salesperson, or investment adviser representative, or the substantial equivalent of those terms as defined in this chapter, or is the subject of an order of the Securities and Exchange Commission suspending or expelling the applicant or registrant from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States Post Office fraud order; but:
  - (A) The commissioner may not institute a revocation or suspension proceeding under this paragraph more than one year from the date of the order relied on; and
  - (B) The commissioner may not enter an order under this paragraph on the basis of an order under another law of this State unless that order was based on facts which would currently constitute a ground for an order under this section;
- (7) Has engaged or is about to engage in fraudulent, dishonest, or unethical practices in the securities business;

- (8) Is insolvent, either in the sense that liabilities exceed assets or in the sense that the dealer, investment adviser, salesperson, or investment adviser representative cannot meet obligations as they mature; but the commissioner may not enter an order against a dealer or investment adviser under this paragraph without a finding of insolvency as to the dealer or investment adviser;
- (9) Is not qualified on the basis of such factors as training, experience, and knowledge of the securities business;
- (10) Has failed reasonably to supervise agents, if a dealer or agent of a dealer with supervisory responsibilities, or employees, if an investment adviser or an employee of an investment adviser with supervisory responsibilities; for the purposes of this paragraph no person shall be deemed to have failed reasonably to supervise any person if there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violations by such other person, and such person has reasonably discharged the duties and obligations incumbent upon the person by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with; or
- (11) Has demonstrated unworthiness to transact the business of dealer, investment adviser, salesperson, or investment adviser representative.

In cases of charges against a salesperson or investment adviser representative notice thereof shall also be given the dealer or investment adviser employing such salesperson or investment adviser representative. Pending the hearing, the commissioner may order the suspension of the dealer's, investment adviser's, salesperson's, or investment adviser representative's registration; provided the order states the cause for the suspension.

Until the entry of a final order the suspension of the dealer's or investment adviser's registration, though binding upon the persons notified thereof, shall be deemed confidential, and shall not be published, unless it appears that the order of suspension has been violated after notice.

In the event the commissioner determines to refuse or revoke a registration as provided in this section, the commissioner shall enter a final order with the commissioner's findings on the register of dealers, investment advisers, salespersons, and investment adviser representatives; and suspension or revocation of the registration of a dealer or investment adviser shall also suspend or revoke the registration of all the dealer's or investment adviser's salespersons or investment adviser representatives.

It shall be sufficient cause for refusal or cancellation of registration in case of a partnership or corporation or any unincorporated association, if any member of a partnership or any officer or director of the corporation or association has been guilty of any act or omission which would be cause for refusing or revoking the registration of an individual dealer, investment adviser, salesperson, or investment adviser representative.

#### **[§485-15.5] Suspension or denial of license for noncompliance with child support order.**

In addition to any other acts or conditions provided by law, the commissioner shall refuse to renew, reinstate, or restore, or shall deny or suspend any license if the authority has received certification from the child support enforcement agency pursuant to the terms of section 576D-13 that the licensee or



applicant is not in compliance with an order of support or has failed to comply with a subpoena or warrant relating to a paternity or child support order. Unless otherwise provided by law, the commissioner shall renew, reinstate, restore, or grant the license only upon receipt of an authorization from the child support enforcement agency, the office of child support hearings, or the family court. Sections 92-17, 485-15, and 485-16 shall not apply to a refusal to renew, reinstate, or restore a license or to a license suspension or denial pursuant to this section.

**§485-16 Dealers' and investment advisers' records and reports; commissioner's powers.** (a) Except as otherwise provided in this section, every dealer and investment adviser registered under this chapter shall make and keep for a period of three years after the close of the calendar or fiscal year to which they pertain, full and complete records of the dealer's or investment advisor's business, which records shall be open to inspection by the commissioner of securities and, in addition, shall file with the commissioner annual or special reports of the condition, financial or other, of the dealer or investment adviser, in the form and detail, that the commissioner shall require. For the purpose of avoiding unnecessary duplication of inspections and examinations, the commissioner may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any national securities exchange or national securities association registered under the Securities Exchange Act of 1934. If any dealer or investment adviser fails or refuses to make or keep any record or to file any report, the commissioner may subpoena the dealer, investment adviser, or any person having knowledge of the dealer's or investment adviser's affairs to appear and testify or produce documentary evidence, administer oaths, and examine the dealer, or investment adviser, or any person under oath with respect to the affairs of the dealer or investment adviser. The subpoena shall have the same force and effect and shall be served in the same manner as if issued from a court of record. Witness fees and mileage claims shall be allowed the same as for testimony in a court of record. Witness fees, mileage, and actual expenses necessarily incurred in securing the attendance of witnesses and of testimony and the production of documents shall constitute a charge against the dealer or investment adviser, recoverable by action by the State for the use of the persons entitled thereto. If any individual fails to obey the subpoena or obeys the subpoena and refuses to testify when required concerning the matter under investigation, the commissioner shall file the commissioner's written report thereof and proof of service of the commissioner's subpoena in the circuit court for the circuit in which the examination is being conducted. Thereupon, the court shall forthwith cause the individual to be brought before it to show cause why the individual should not be held in contempt; and if so held, may punish the individual as if the failure or refusal related to a subpoena from or testimony in that court.

(b) This section shall not apply to any dealer that is registered under the Securities Exchange Act of 1934 or to an investment adviser that maintains its principal place of business in a state other than this State; provided the investment adviser is registered in the state where it maintains its principal place of business and is in compliance with that state's recordkeeping requirements, if any. The commissioner may require:

- (1) The filing of any financial or operational report that is required to be filed under the Securities Exchange Act of 1934 or under the laws of the state where an investment adviser maintains its principal place of business; and

- (2) The production of any document, in accordance with the procedures set forth in subsection (a), required to be maintained by a dealer registered under the Securities Exchange Act of 1934 or by the state in which an investment adviser maintains its principal place of business.

**§485-17 Pleading, burden of proof, of exemption.** It shall not be necessary to negate any of the exemptions in this chapter provided in any complaint, information, indictment, or any other writ or proceedings laid or brought under this chapter and the burden of establishing the right to any such exemption shall be upon the party claiming the benefit of the exemption and any person claiming the right to register any securities by notification under section 485-9 shall also have the burden of establishing the right so to register the securities.

**§485-18 Escrow of certain securities.** (a) As a condition to registration of any securities under this chapter, the commissioner of securities may, in the commissioner's discretion, by order, require that any securities issued for, or which are intended to be issued for, any option, lease, assignment, patent right, copyright, trademark, process, formula, good will, going concern value, organization, or promotion fees or expenses, or other intangible assets, or issued or intended to be issued in payment for property shall be delivered in escrow to the commissioner or other depository satisfactory to the commissioner under an escrow agreement that the owners of the securities shall not be entitled to sell or transfer the securities without the consent of the commissioner, that the owners thereof shall not be entitled to withdraw the securities from escrow until all other securities holders who have paid for their securities in cash have been paid dividends or interest aggregating not less than six per cent, shown to the satisfaction of the commissioner to have been actually earned and paid, and that in case of dissolution or insolvency during the time the securities are held in escrow, the owners thereof shall not participate in any distribution of assets unless and until after the owners of all other securities have been paid in full.

(b) As a condition to registration of any securities under this chapter, the commissioner may, in the commissioner's discretion, require that all treasury stock of the issuer or other securities issued and thereafter acquired by the issuer, be delivered in escrow to the commissioner or other depository satisfactory to the commissioner, subject to such terms and conditions as to release from escrow as the commissioner deems necessary in the circumstances.

**§485-18.7 Violation of chapter; cease and desist order.** (a) Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order issued or promulgated hereunder, the commissioner may in the commissioner's discretion issue a cease and desist order to enforce compliance with this chapter or any rule or order issued or promulgated hereunder. The commissioner shall have the discretion to determine the disposition of any contracts entered into by the respondent and shall specify in the order whether such contracts shall be suspended, completed, or rescinded. The commissioner shall have the discretion to include in the order an assessment of an administrative penalty

against any person who violates this chapter or who has knowingly violated a rule or order of the commissioner made pursuant to this chapter. An administrative penalty of not more than \$100,000 may be assessed for each violation.

(b) Upon the issuance of an order by the commissioner under subsection (a), the commissioner shall promptly notify the respondent that an order has been issued and the reasons therefor and that upon the receipt of a written request made within thirty days the matter will be set for a hearing to commence within fifteen business days after receipt of the request unless extended by the commissioner for good cause. During the pendency of any hearing requested under this subsection, the cease and desist order shall remain in effect unless vacated or modified by the commissioner; provided that any penalty shall not take effect until the final order is issued.

(c) After the hearing, the commissioner shall issue a final order that shall affirm, vacate, or modify the order in effect during the pendency of the hearing. If no hearing is requested and none is ordered by the commissioner, the cease and desist order shall constitute the final order issued and shall remain in effect until it is modified or vacated by the commissioner.

(d) All hearings and rehearings shall be public.

(e) Upon a proper showing, a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the respondent or the respondent's assets. The court shall not require the commissioner to post a bond.

**§485-19 Injunctions.** Whenever it shall appear to the commissioner of securities either upon complaint or otherwise, that in the issuance, sale, promotion, negotiation, advertising, or distribution of any securities within the State, including any security exempted under section 485-4, and including any transaction exempted under section 485-6, any person, as defined in this chapter:

- (1) Has employed or employs, or is about to employ any device, scheme, or artifice to defraud or for obtaining money or property by means of any false pretense, representation, or promise;
- (2) Or that any such person has made, makes, or attempts to make in the State fictitious or pretended purchases or sales of securities;
- (3) Or has engaged in or engages in or is about to engage in any practice or transaction or course of business relating to the purchase or sale of securities (A) which is in violation of law, (B) or which is fraudulent, (C) or which has operated or which would operate as a fraud upon the purchaser; any one or all of which devices, schemes, artifices, fictitious or pretended purchases or sales of securities, practices, transactions, and courses of business are declared to be and are hereinafter referred to as fraudulent practices;
- (4) Or that any person is acting as dealer, investment adviser, salesperson, or investment adviser representative within the State without being duly registered as such dealer, investment adviser, salesperson, or investment adviser representative as provided in this chapter;

the commissioner may investigate and whenever the commissioner believes from evidence satisfactory to the commissioner: that any such person has engaged in, is engaged, or is about to engage in any of the practices or transactions hereinbefore referred to as and declared to be fraudulent practices; or is selling or offering for sale any securities in violation of this chapter or is acting as a dealer, investment adviser,

salesperson, or investment adviser representative without being duly registered as provided in this chapter, the commissioner may, in addition to any other remedies, bring suit in the name and on behalf of the State against such person and any other person or persons concerned in or in any way participating in or about to participate in such fraudulent practices or acting in violation of this chapter, to enjoin such person and such other person or persons from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof or in violation of this chapter.

In any such court proceedings the commissioner may apply for and on due showing be entitled to have issued the court's subpoena requiring forthwith the appearance of any defendant and the defendant's employees, salespersons, or agents and the production of documents, books, and records as may appear necessary for the hearing of such petition to testify and give evidence concerning the acts or conduct or things complained of in the application for injunction. In the suit the circuit courts sitting without a jury have jurisdiction of the subject matter and a judgment may be entered awarding such injunction as may be proper.

**§485-20 Remedies.** (a) Sales voidable when and by whom. Every sale made in violation of this chapter shall be voidable at the election of the purchaser; and the person making the sale and every director, officer, or agent of or for the seller, if the director, officer, or agent has personally participated or aided in any way in making the sale, shall be jointly and severally liable to the purchaser in an action at law in any court of competent jurisdiction upon tender of the securities sold or of the contract made for the full amount paid by the purchaser, with interest, together with all taxable court costs (and reasonable attorney's fees); provided that notwithstanding any law to the contrary, no action shall be brought for the recovery of the purchase price after five years from the date of the sale or after two years from the discovery of facts constituting the violations, but in any event after seven years from the date of the sale; and provided further that no purchaser otherwise entitled shall claim or have the benefit of this section who has refused or failed within thirty days from the date thereof to accept an offer in writing of the seller to take back the security in question and to refund the full amount paid by the purchaser, together with interest on the amount for the period from the date of payment by the purchaser down to the date of repayment, such interest to be computed:

- (1) In case the securities consist of interest-bearing obligations, at the same rate as provided in the obligations; and
- (2) In case the securities consist of other than interest-bearing obligations, at the rate of ten per cent a year; less, in every case, the amount of any income from the securities that may have been received by the purchaser.

(b) Action on bond. Any person having a right of action against a dealer or salesperson under this section shall have a right of action under the bond provided in section 485-14.

(c) Registration in good faith. A registration by notification made in good faith and after the commissioner of securities, on application, has given tentative consent to such registration, shall not, as to sales made prior to revocation of the registration, result in the liabilities prescribed in this section, although the securities may not be entitled to such registration.

**§485-20.5 Civil penalty.** (a) The commissioner may bring an action to recover a civil penalty against any person who violates this chapter or who has knowingly violated a rule or order of the commissioner made pursuant to this chapter. A civil penalty of not more than \$100,000 may be assessed for each violation.

(b) No civil action shall be brought under this chapter after the expiration of five years from the date of the violation or after expiration of two years from the discovery of facts constituting the violation, but in no event after the expiration of seven years from the date of the violation.

**§485-21 Criminal penalties.** (a) Whoever violates this chapter shall be punished as follows:

- (1) An offense in which the total value of all money and anything else of value paid by or lost by the victims pursuant to the same scheme, plan or representations, or to the same entity, amounts to under \$5,000 shall be a class C felony as defined by the Hawaii Penal Code;
- (2) An offense in which the total value of all money and anything else of value paid by or lost by the victims pursuant to the same scheme, plan, or representations, or to the same entity, amounts to \$5,000 but less than \$100,000 shall be a class B felony as defined by the Hawaii Penal Code;
- (3) An offense in which the total value of all money and anything else of value paid or lost by the victims pursuant to the same scheme, plan, or representations, or to the same entity, amounts to \$100,000 or more shall be a class A felony as defined by the Hawaii Penal Code.

In addition to the above, whoever violates this chapter shall forfeit to the State (1) any interest or property he has acquired or maintained in violation of this chapter, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of this chapter.

(b) The value of all money and anything else of value paid or lost by various victims pursuant to the same scheme, plan, or representations or to the same entity may be aggregated in determining the class or grade of the offense.

(c) Upon conviction of a person under this chapter, the circuit court shall authorize the county attorney or prosecutor, or the attorney general, to seize all property or other interest declared forfeited under this chapter upon such terms and conditions as the court shall deem proper. The State shall dispose of all property or other interest seized under this chapter as soon as feasible making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the State, it shall not revert to the convicted person and the commissioner shall dispose of said property as deemed proper by the commissioner.

(d) Notwithstanding any other law to the contrary, a person convicted of a felony under this chapter who has a prior conviction for felony under this chapter or a prior conviction for a crime which would constitute a felony under this chapter shall be sentenced to a mandatory minimum period of imprisonment of one year without possibility of parole. Nothing in this subsection shall be construed to in any way limit the maximum term of imprisonment imposed pursuant to chapter 706.

(e) Notwithstanding any other laws to the contrary, the following period of limitations will apply to prosecutions for felony violations of this chapter:

- (1) Prosecution for a felony under this chapter shall be commenced within five years after the offense is committed.
- (2) If the period prescribed in paragraph (1) has expired, prosecution for a felony under this chapter may be commenced within two years after the discovery of the offense by an aggrieved party and who is himself not a party to the offense, but in no event more than seven years after the offense is committed.

**§485-22 Statutory or common-law remedies.** Nothing in this chapter shall limit any statutory or common-law right of any person to bring any action in any court for any act involved in the sale of securities, or the right of the State to punish any person for any violation of any law.

**§485-23 Appeals to circuit court, first circuit; time; bonds; costs; decree; further appeal.** An appeal may be taken by any aggrieved person from any final order of the commissioner of securities to the circuit court of the first circuit in the manner provided in chapter 91. The appellant shall execute a bond in the penal sum of \$1,000 to the State, with sufficient surety, to be approved by the commissioner or the court, conditioned upon the faithful prosecution of the appeal to final judgment, and the payment of all such costs as shall be adjudged against the appellant. The appeal shall be conducted without a jury and confined to the record, and it may be given precedence by the court over other matters pending in the court. If the order of the commissioner is reversed the court shall by its mandate specifically direct the commissioner as to the commissioner's further action in the matter, including the making and entering of any order or orders in connection therewith, and the conditions, limitations, or restrictions to be therein contained; provided that the commissioner shall not thereby be barred from thereafter revoking or altering the order for any proper cause which may thereafter accrue or be discovered. If the order is affirmed, the appellant shall not be barred after thirty days from filing a new application provided the application is not otherwise barred or limited. The appeal shall not in anywise suspend the operation of the order appealed from during the pendency of the appeal unless upon proper order of the commissioner or the court. An appeal may be taken from the decree of the circuit court to the supreme court.

**§485-24 Delivery of prospectus to purchaser.** No sale or contract of sale of any security required to be registered by qualification shall be concluded unless prior to the conclusion thereof a copy of a prospectus meeting the requirements of paragraph (3) or (4) of subsection (b) of section 485-10 is delivered to the purchaser thereof.

**[§485-24.5] Prospectus; small corporate offerings registration form.** (a) The prospectus required for registration by qualification under section 485-10(b)(3) may be satisfied by the Small Corporate Offerings Registration Form (Form U-7) adopted by the North American Securities

Administrators Association; provided that all of the qualifications in the instructions for use of the form are fulfilled.

- (b) The commissioner shall adopt rules pursuant to chapter 91 to implement this section.

**[§485-24.6] General announcements of proposed offerings to accredited investors.** (a)

No transaction shall be exempt under section 485-6(16) unless it complies with this section. A general announcement of a proposed offering for which the issuer is claiming the exemption under section 485-6(16), may be made by any means and shall include only the following information unless specifically permitted by the commissioner:

- (1) The name, address, and telephone number of the issuer of the securities;
- (2) The name, a brief description, and price, if known, of any security to be issued;
- (3) A brief description of the business of the issuer in twenty-five words or less;
- (4) The type, number, and aggregate number of securities being offered;
- (5) The name, address, and telephone number of the person to contact for additional information; and
- (6) A statement that:
  - (A) Sales will only be made to accredited investors;
  - (B) No money or other consideration is being solicited or will be accepted by way of this general announcement; and
  - (C) The securities have not been registered with or approved by any state securities agency or the United States Securities and Exchange Commission and are being offered and sold pursuant to an exemption from registration.

(b) Dissemination of the general announcement of the proposed offering to persons who are not accredited investors shall not disqualify the issuer from claiming the exemption under section 485-6(16).

(c) The issuer, in connection with an offer, may provide information in addition to the general announcement under subsection (a), if such information:

- (1) Is delivered through an electronic database that is restricted to persons who have been prequalified as accredited investors; or
- (2) Is delivered after the issuer reasonably believes that the prospective purchaser is an accredited investor.

(d) No telephone solicitation shall be permitted unless prior to placing the call, the issuer reasonably believes that the prospective purchaser to be solicited is an accredited investor.

(e) For the purposes of this section, "accredited investor" shall have the same meaning as provided in 17 Code of Federal Regulations section 230.501(a).

**§485-25 Fraudulent and other prohibited practices.** (a) It is unlawful for any person, in connection with the offer, sale, or purchase (whether in a transaction described in section 485-6 or otherwise) of any security (whether or not of a class described in section 485-4), in the State, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud;

- (2) To make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;
  - (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;
  - (4) To issue, circulate, or publish any prospectus, circular, advertisement, printed matter, document, pamphlet, leaflet, or other literature (in this chapter sometimes referred to collectively as "advertising matter") which shall contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein made, in the light of the circumstances under which they are made, not misleading;
  - (5) To issue, circulate, or publish any advertising matter or make any written representation, unless the name of the person issuing, circulating, publishing, or making the same and the fact that the person is issuing, circulating, or making the same shall be clearly indicated thereon;
  - (6) To make any statement or representation, or issue, circulate, or publish any advertising matter containing any statement, to the effect that the security has been in any way approved or endorsed by the commissioner of securities; or
  - (7) To issue, circulate, or publish any advertising matter unless a copy thereof has been previously filed with the office of the commissioner, or unless the commissioner has by rule or order exempted the filing of any advertising material.
- (b) It is unlawful for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise:
- (1) To employ any device, scheme, or artifice to defraud the other person; or
  - (2) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person.
- (c) It is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing:
- (1) That the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;
  - (2) That no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract;
  - (3) That the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change;
  - (4) That the investment adviser and investment adviser representative shall disclose to the client in a separate disclosure statement the capacity in which the investment adviser and investment adviser representative are acting and the compensation to be received in situations where:
    - (A) The investment adviser is acting as principal for the investment adviser's own account and knowingly sells any security to or purchases any security from a client for whom the investment advisor is acting as investment adviser; or



- (B) The investment adviser is acting as broker for a person other than the client and knowingly effects any sale or purchase of securities, real estate, insurance contracts, annuities contracts, or any types of real or personal property for the account of the client; and
- (5) That the investment adviser and investment adviser representative shall provide the disclosure statement described in subsection (c)(4) and obtain the written consent of the client to the transactions described in the disclosure statement prior to the closing of the transactions.

Paragraph (1) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date. "Assignment", as used in paragraph (2), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but, if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

(d) It is unlawful for any investment adviser to use any scheme, device, or artifice to circumvent or attempt to circumvent the prohibitions or limitations in subsection (c).

(e) Subsection (a)(5) and (7) shall not apply to any advertising matter that is covered by section 18(a) of the Securities Act of 1933, which relates to or is used in connection with the offer or sale of a federal covered security.